



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

FEB 26 2004

REPLY TO THE ATTENTION OF
(A-18J)

Janet G. McCabe, Assistant Commissioner
Office of Air Quality
Indiana Department of Environmental Management
100 North Senate Avenue
P.O. Box 6015
Indianapolis, Indiana 46206-6015

Dear Ms. McCabe:

This is in response to your January 12, 2004, letter regarding the implementation of New Source Review (NSR) in areas that will be designated as nonattainment for the new 8-hour ozone standard. We appreciate the work that your office has done to formulate and raise to us the questions below. We also understand that the States are under a narrow time frame to get answers before the designations for the new ozone standards go into effect. The following are your questions and our response.

1. *When will the new designations be considered effective? Upon issuance of final letters to the Governors (expected on April 15, 2004)?*

The designation notice will be signed no later than April 15, 2004 and will provide the effective date. At this time, we expect the designations to be effective in mid to late May.

2. *When will nonattainment new source review be required in newly designated counties? Please explain the legal basis setting forth the requirements.*

The nonattainment NSR requirements apply to newly designated nonattainment areas upon the effective date of the designation. After this effective date, permits issued in these areas must satisfy the part D nonattainment NSR requirements, as required by 40 CFR 52.24(k) and 40 CFR part 51, appendix S. According to appendix S, "a major new source or major modification which would locate in an area designated in 40 CFR 81.300 et seq., as nonattainment for a pollutant for which the source or modification would be major may be allowed to construct only if the stringent conditions set forth below are met." These requirements

include applying the lowest achievable emission rate (LAER) and obtaining sufficient offsetting emission reductions to assure that the new major source will not interfere with the area's progress toward attainment. A more detailed discussion of 40 CFR 52.24(k) and appendix S is set forth in the proposed rule to implement the 8-hour ozone standard (68 FR 32843-32848, June 2, 2003). Implementation of part D nonattainment NSR requirements on the date of designation is consistent with our past guidance on this matter. See "New Source Review Transitional Guidance" at A-6 (March 11, 1991).

3. *If an application is filed before the effective date of designations but the permit is issued after that date, which permitting rules apply, attainment or nonattainment? Again, cites to appropriate sections of the Clean Air Act (the Act) or regulations would be helpful.*

As we explained in our response to question 2, permits issued in nonattainment areas must meet the part D nonattainment NSR requirements as set forth in 40 CFR 52.24(k) and appendix S. An exemption is not provided for sources that applied for a permit during the period when an area was in attainment. Furthermore, under the federal PSD regulations, the applicability of PSD requirements is limited to "an area designated as attainment or unclassifiable." 40 CFR 51.166(a)(7)(i); 52.21(a)(2)(i). Therefore, a PSD permit for a pollutant cannot be issued in an area that is designated nonattainment for that pollutant. See "New Source Review Transitional Guidance" at A-6 (March 11, 1991). As a result, a source that submits a permit application before the nonattainment designation effective date, but does not obtain a final issued permit by the effective date must apply for a part D nonattainment NSR permit if emissions exceed the major source or major modification threshold.

4. *Does the United States Environmental Protection Agency (EPA) Region V have any record of Indiana addressing or committing to apply the requirements in 40 CFR part 51, appendix S, as an element of its State Implementation Plan (SIP)? We are researching our records, but thought it would be helpful if your staff could investigate this as well, since it would have happened several decades ago, if at all.*

Our staff have searched our records and were unable to find any indications of a previous commitment from Indiana to apply 40 CFR part 51, appendix S.

5. Could you please confirm the thresholds that will apply for new sources and modifications in nonattainment areas? Will it be 100 tons per year for new sources and 40 tons per year for modifications designated under Subpart 1 or marginal or moderate under Subpart 2?

Pursuant to the definition of "major stationary source" in §302(j) of the Act and 40 CFR 51.165(a)(1)(iv)(A)(1) and the definition of "significant" in 40 CFR 51.165(a)(1)(x), Subpart 1 nonattainment areas and marginal or moderate Subpart 2 nonattainment areas will have a 100 tons per year major source threshold and a 40 tons per year significance threshold for triggering major NSR for ozone precursor pollutants.

6. For the designated ozone nonattainment areas, will it be necessary for major new sources (or major modifications) of nitrogen oxides (NOx) to obtain emission offsets for NOx, given that the States are now operating under a NOx budget pursuant to the NOx SIP Call? If yes, will the waiver procedure still be available to States upon a demonstration that NOx reductions in a particular area will be counterproductive?

In areas that are designated nonattainment for ozone, major new sources or major modifications must continue to obtain offsets pursuant to §173 of the Act. EPA has expressed the view that nonattainment NSR offset requirements of the CAA can be met using the mechanism of the NOx Budget Trading Program, but has pointed out that integrating these programs involves many complex issues. 63 Fed. Reg. 57355, 57475-76 (Oct. 27, 1998). EPA is continuing to work toward resolving these issues.

According to the June 2, 2003, proposed rule to implement the 8-hour ozone standard (68 FR 32840), the NOx waiver procedure of §182(f) of the Act would still be available to States upon a demonstration that net air quality benefits are greater in the absence of reductions of NOx from the sources concerned. The preamble to the proposed rule further provides that: "for areas that were previously granted a NOx waiver under the 1-hour ozone standard, a re-approval would be needed to make it clear that the exemption applies, to allow for public comment, to be consistent with the waiver guidance under the 8-hour standard (once issued) and to account for any new information that may point to a different conclusion." It is important to note that, if this provision is finalized as proposed, States will be required to seek re-approval for the NOx waiver in 8-hour

ozone nonattainment areas.

7. *What will be the baseline date for offsets for NSR permitting in new nonattainment areas?*

To clarify, we understand this question to be a request for the baseline date after which emission reduction credits remain available for the purpose of obtaining offsets for NSR permitting. The baseline date for NSR offsets in 8-hour ozone nonattainment areas will be based on the date of the emission inventory data or emission projections. In most areas, this will be 2002. However, in future years if there are updated emissions inventories or projections used for an attainment demonstration, the new inventory or projection date will replace the existing baseline date. The regulations governing offsets can be found at 51.165(a)(3).

8. *If a source has gotten a permit under the Prevention of Significant Deterioration (PSD) program and does not construct within 18 months, what permitting rules will apply if the county has now been designated nonattainment?*

According to 40 CFR 52.21(r)(2), an approval to construct (e.g.; a PSD permit) becomes invalid if a source does not commence construction within 18 months of permit issuance (the regulation allows for an extension to the 18-month period to construct upon a satisfactory showing that an extension is justified, however for the purpose of your question we will presume that the permitting authority does not grant an extension to an approval to construct). If this scenario occurs in a county that has since been designated nonattainment, consistent with our response to question 2, a source must obtain a new permit pursuant to the part D nonattainment NSR requirements that now apply in that area. The SIP-approved Indiana PSD regulation includes language comparable to 40 CFR 52.21(r)(2) in 326 IAC 2-2-8(1).

9. *In the alternative site analysis required in nonattainment NSR, how does EPA interpret the phrase "significantly outweigh the environmental and social costs imposed as a result of a source's location, construction or modification"? How is this measured? Is it still a case by case evaluation?*

The alternative site analysis is required in §173(a)(5) of the Act. This requirement continues to be a case-by-case evaluation for NSR projects located in nonattainment areas. Since this analysis is performed on a case-by-case basis, we

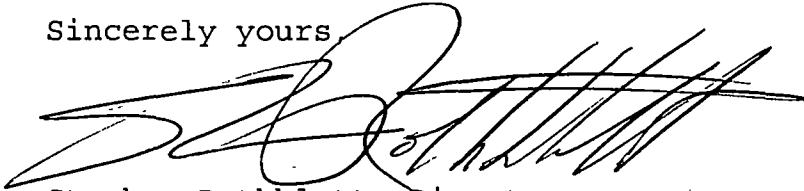
are unable to provide a general answer on the interpretation and measurement of the phrase "significantly outweigh the environmental and social costs imposed as a result of a source's location, construction or modification."

10. Does EPA intend to revise or update appendix S and what is the agency's timeframe?

EPA is in the process of considering whether to update appendix S or adopt a separate rule to address preconstruction permitting during the SIP development period. See 68 FR 46536 (August 6, 2003) and www.epa.gov/ttn/naaqs/ozone/o3imp8hr/documents/proprule/req_text_073103.pdf. At this time, we are unable to provide a time frame for this action.

We appreciate Indiana's efforts to transition to the new 8-hour ozone standard. We will continue to work with your staff to address NSR implementation issues. If you have any questions, please contact Sam Portanova, of my staff, at (312) 886-3189.

Sincerely yours

A handwritten signature in black ink, appearing to read "Stephen Rothblatt", with a large, stylized flourish extending from the end of the signature.

Stephen Rothblatt, Director
Air and Radiation Division